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QUESTIONS PRESENTED.

1. Were the Pennsylvania Superior and Supreme Courts correct in affirming per curiam the trial court's decision to deny a petition to strike a writ of possession, without leave to amend or an evidentiary hearing, where there was no legal basis for petitioner's claim and no issue of fact?

2. Does the Fourteenth Amendment permit the Pennsylvania Superior and Supreme Courts to affirm the decision of a trial court without rendering detailed opinions?

COUNTER-STATEMENT OF THE CASE.

This case involves two corporations, Petitioner Befwick of Philadelphia, Inc. (hereafter "Befwick") and Respondent Massachusetts Mutual Life Insurance Company (hereafter "Massachusetts Mutual"), and Befwick's ejectment from the Public Ledger Building, owned by Massachusetts Mutual, after Befwick failed to comply with an Order and Decree entered by the trial court.

On April 1, 1971 Massachusetts Mutual and Befwick entered into a commercial lease whereby Massachusetts Mutual rented space in the Public Ledger Building to Befwick (R at 5a).[1] Thereafter, on July 6, 1972, Massachusetts Mutual obtained a judgment in ejectment under the lease for Befwick's failure to pay rent and for other defaults, all constituting breaches of conditions of the lease (R at 2a-4a). Befwick then filed a petition to open the judgment (R at 16a) and took four depositions on the merits of the petition to open.

On November 14, 1972 the trial court (Hirsh, J.) denied with prejudice Befwick's petition to open the judgment and entered an Order and Decree, with consent of counsel for both parties (R at 21a). The Order and Decree provided that Massachusetts Mutual would not enforce its judgment in ejectment if Befwick complied with several conditions enumerated in the Order and Decree. The Order and Decree directed the Prothonotary of the trial court to issue a Writ of Possession to Massachusetts Mutual in the event that any condition of the Order and Decree was not met by Befwick (R at 22a-23a). The first condition of the Order and Decree directed Befwick to pay Massachusetts Mutual all back rent within ten days (R at 21a).

1. Citations to petitioner's appendix are referred to by "P" and the appropriate page numbers (*e.g.*, "P at 1a"). Citations to the Record in the court below (Pennsylvania Supreme Court) are referred to by "R" and the appropriate page numbers (*e.g.*, "R at 1a").

Befwick delivered a check to Massachusetts Mutual purporting to comply with the first condition of Judge Hirsh's Order and Decree. However, that check was dishonored by the bank, returned to Massachusetts Mutual stamped "insufficient funds", and charged to Massachusetts Mutual's bank account (R at 33a). Four days later, Befwick gave Massachusetts Mutual a second check for other lease payments. That check also bounced (R at 33a-34a).

Massachusetts Mutual then filed an affidavit of noncompliance in accordance with the Order and Decree (R at 33a). The affidavit stated that Befwick's check delivered to comply with the first condition of the Order and Decree had bounced and that the second check had also been dishonored.

On December 12, 1972 the Prothonotary of the trial court issued a writ of possession to Massachusetts Mutual as directed by the Order and Decree (R at 1a). Thereafter, Befwick filed a petition seeking a rule to show cause why the writ of possession should not be stricken and seeking a stay of proceedings (R at 24a). This time Befwick's petition was predicated on a claim that "money was available" in the bank after the due date set by the Order and Decree (R at 26a). Befwick chose not to conduct any depositions concerning this "tender" as it had done previously in connection with its petition to open the judgment.

Judge Hirsh held two extended conferences on Befwick's petition. By agreement of counsel and Judge Hirsh, both counsel and the principals attended the second conference. At that time Befwick still did not have sufficient funds to cover the dishonored checks and pay current rents. Judge Hirsh then denied Befwick's petition because it was insufficient as a matter of fact and law (R at 30a-32a).

Befwick appealed to the Pennsylvania Superior Court. The briefs, Record, extensive oral argument by both

parties before the Superior Court and a letter "supplement" sent by Befwick to the Court disclosed that there were no issues of fact and that Befwick's claims were insufficient as a matter of law. Consequently, the Superior Court rejected them by its affirmance per curiam of the trial court's decision (P at 2a).

Befwick then petitioned the Pennsylvania Supreme Court, which granted *allocatur*. The Pennsylvania Supreme Court considered the briefs, the Record and oral argument, and then affirmed per curiam the order of the Superior Court with the notation—"Mr. Justice Roberts would dismiss the appeal as improvidently granted" (P at 1a).

Subsequently Befwick filed its Petition for Writ of Certiorari with this Court. Befwick asserts in its Petition that the Pennsylvania judiciary at the trial and both appellate court levels denied Befwick due process guaranteed under the Fourteenth Amendment to the United States Constitution. Befwick claims it was entitled to (1) an evidentiary hearing by the trial court on its petition to strike the writ of possession or leave to amend, and (2) more than per curiam affirmances by the two Pennsylvania appellate courts. For the reasons set forth herein, Befwick's Petition for Writ of Certiorari is utterly without merit.

ARGUMENT.

There is no federal question involved in this case. The decisions of the several Pennsylvania courts which have already ruled against Petitioner in no way conflict with the decisions of this Court. Petitioner really seeks to have this Court review the Pennsylvania courts' view of Pennsylvania law and their application of Pennsylvania law to the facts of this case.

I. The Fourteenth Amendment Does Not Require Leave to Amend or an Evidentiary Hearing Where There Are No Disputed Issues of Fact and a Party Is Not Entitled to the Relief Sought as a Matter of Law.

Using inflammatory rhetoric and changing its story as it goes along, Befwick attempts to mask the case before this Court. This case simply involves a commercial tenant which violated a number of conditions of a commercial lease, including the payment of rent. After being given a second chance by Order and Decree of the trial court, the tenant again failed to comply. The trial court concluded the tenant was not entitled to a third chance—concluded that its Order and Decree must be enforced. The Pennsylvania appellate courts agreed.

The trial court, the Pennsylvania Superior Court and Pennsylvania Supreme Court have all rejected Befwick's claim that a so-called tender, made after the specific due date in the trial court's Order and Decree, is ground for striking a writ of possession issued in accordance with the Order and Decree. There were no issues of fact before Judge Hirsh in the trial court, and as a matter of law Befwick was not entitled to relief. At each stage of the appellate proceedings Befwick significantly shifted its story in an attempt to create a basis for relief (see footnotes 4-6, *infra*). However, the appellate courts correctly rejected Befwick's new versions as insufficient to deprive Massa-

chusetts Mutual of possession to which it was clearly entitled.

A. Pennsylvania Law Did Not Provide for a Tender.

In both the Pennsylvania Superior and Supreme Courts, Befwick argued that the Pennsylvania Landlord and Tenant Act [2] permitted Befwick to make a late "tender" to void the writ of possession. Both courts properly rejected Befwick's arguments. Befwick simply seeks review of those decisions by this Court (Petition, pp. 10, 11).

Befwick contended that the Pennsylvania Landlord and Tenant Act limited Massachusetts Mutual's right to possession. However, the remedy being pursued by Massachusetts Mutual was expressly provided for by the commercial lease and was independent of the Pennsylvania Landlord and Tenant Act. Moreover, Section 511 of Article V of the Act specifically exempted the action brought by Massachusetts Mutual from the Act.

Even if the Pennsylvania Landlord and Tenant Act had been applicable, it would not have permitted tender in this case. The Act permits tender only "in any case for the recovery of possession *solely* because of failure to pay rent" (emphasis supplied). Here Befwick violated many other conditions of the lease as well (R. at 3a, 16a-17a). Thus, even if the provision of the Pennsylvania Landlord and Tenant Act relied upon by Befwick had been applicable, which it was not, Befwick's claim had to be denied.

B. Court Orders Must Be Complied With.

Befwick argued in the appellate courts below that it was entitled to "tender" money to Massachusetts Mutual *after* the specific due date prescribed by the Order and

2. Specifically, Section 504, Act of April 6, 1951, P. L. 69, Art. V, §§ 501-511, 68 P. S. §§ 250.501-511.

Decree had passed without compliance. To reach the conclusion Befwick urged, the courts below would have had to ignore completely the Order and Decree, Bewick's own sworn statements, and the prior history of the case. The trial court's Order and Decree specified the time by which monies were to be paid. No tender was proper which did not fully meet the requirements of the Order and Decree. Since Befwick failed to comply with the very first condition of the Order and Decree, the judgment was in effect and Massachusetts Mutual was entitled to its property.

Befwick claims that *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, 175 A. 2d 58 (1961), supports its contention (Petition, pp. 6, 12). However, *Shaler* simply reinforces Massachusetts Mutual's position. There the lower court, upon petition to stay a mortgage foreclosure to satisfy a money judgment entered when a consent decree was not complied with, had modified the consent decree, extending the deadline for and ordering acceptance of payment. The Pennsylvania Supreme Court reversed and held that the lower court had no authority to change or modify the original consent decree.[3]

3. The Pennsylvania Supreme Court remanded the *Shaler* case for determination by the lower court of a pending petition to open judgment. However, in the case at bar the petition to open judgment had already been denied *with prejudice* by the trial court as part of the Order and Decree (R at 21a) and, therefore, under the *Shaler* rule could not be altered.

As to binding and res judicata effect of consent decrees in Pennsylvania, see also *Zampetti v. Cavanaugh*, 406 Pa. 259, 176 A. 2d 906 (1962) and *Baran v. Baran*, 166 Pa. Superior Ct. 532, 72 A. 2d 623 (1950).

Barraclough v. Atlantic Refining Co., 230 Pa. Superior Ct. 276, 326 A. 2d 477 (1974), cited by Befwick at page 12 of its Petition, similarly fails to support Befwick's claims. It is inapposite in that no Order and Decree was involved. In *Barraclough* payments under a lease were faithfully made, but sent to the wrong party because of failure of the landlord to give proper notice to the tenant. That case is a far cry from Befwick's patent violation of the Order and Decree involved here.

C. There Were No Issues of Fact.

Befwick's second petition in the trial court did not and could not raise any issues of fact. There could have been no "tender" as a matter of law. Accordingly, neither amendment of Befwick's petition nor a hearing was required. Any further proceeding before Judge Hirsh would have only improperly delayed Massachusetts Mutual's rightful possession of its property. Befwick never asked the trial court for leave to amend or even suggested that a better version of its story was available. Even the "better" versions argued to the Pennsylvania Superior and Supreme Courts (see footnotes 5 and 6, *infra*) failed to support Befwick's claim.

Befwick appears to contend that in the case of every petition addressed to a trial court, even where there can be no better statement of the facts, a lower court must, *sua sponte*, enter an order granting leave to amend. This is nonsense. Befwick's version of the "tender" story in the trial court was not merely technically insufficient. The sworn averments were flatly false, as conclusively shown by the bank statement submitted by Befwick.[4] Befwick's second version, presented for the first time in the Pennsylvania Superior Court, represented a significant shift of Befwick's story and was also untrue.[5] Befwick's third

4. The petition Befwick presented in the trial court (R at 26a) represented that "money was available" in Befwick's bank account one week before the affidavit of noncompliance was filed (December 11—R at 1a) and the Writ of Possession issued (December 12—R at 1a). One week prior to those dates would have been December 4 and 5. The bank statement heavily relied upon by Befwick in its brief in the Pennsylvania Superior Court showed the trial court version to be insufficient in fact—the balance in the bank was a mere $7.87 (R at 37a).

5. Befwick claimed in the Superior Court that it had alleged in the trial court that a "tender" was made on December 8, 1972 (after the date specified by the Order and Decree). But the trial court petition had alleged that the so-called tender occurred on

version, presented to the Pennsylvania Supreme Court, was equally incredible and contrary to Befwick's sworn statements in the trial court.[6]

Befwick asserts that due process requires a hearing in every case, but cites no authority to support this. Indeed the very rules of procedure promulgated by order of this Court belie this assertion. See Fed. R. Civ. P. 12(c) and 56 and corresponding Pennsylvania R. Civ. P. 1034 and 1035, providing for motions for judgment on pleadings and summary judgment.

The contentions advanced by Befwick in its petition before the trial court were inadequate as a matter of admitted fact and as a matter of law. Thus there was no need for an evidentiary hearing. The orders and decisions of the several Pennsylvania courts were fully consonant with due process.

II. The Fourteenth Amendment Does Not Require an Appellate Court to File an Opinion Articulating Its Reasons for a Per Curiam Affirmance.

Petitioner's contention that due process requires appellate courts to file detailed opinions each time a lower

5. (Cont'd.)
December 4th or 5th (see footnote 4, *supra*). The absence of money in the bank on the 4th and 5th shows why there was such a significant shift in Befwick's story (R at 37a).

6. In the Pennsylvania Supreme Court Befwick claimed that the sworn statement of Befwick's president in the trial court was not true due to an error of Befwick's counsel as to the date the writ of possession was issued (P at 33a). But this claim was patently false also, for the petition in the trial court showed that Befwick's counsel knew very well when the writ of possession was issued (R at 24a).

Befwick's Petition to this Court has abandoned the unsuccessful "mistake" argument made in the Pennsylvania Supreme Court and reinstated the version presented to the Pennsylvania Superior Court. Befwick has thus attempted significant shifts in its story to suit its argument at each stage of its appeal.

court decision is affirmed is equally without merit. To even make such an argument is to imply that where no opinion is written the justices of the appellate courts cannot have given due consideration to the issues presented on appeal. The practice of virtually every appellate court in the United States, including this Court, supports the affirmance of decisions without opinion.

Moreover, this issue was not raised in the court below. If Befwick truly believed that a per curiam Superior Court order violated Befwick's constitutional rights, it would have raised the question in the Pennsylvania Supreme Court. However, nowhere in the statement of questions presented is it even hinted that the Pennsylvania Supreme Court was being asked to review the absence of a detailed opinion of the Superior Court (P at 27a). Accordingly, Petitioner has failed to preserve this question for review in this Court. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n. 6, (dissent) 334-336 (1968); Pennsylvania Supreme Court Rule 52.

CONCLUSION.

Befwick has been accorded due process throughout this case. Indeed when Befwick was given a second chance by the trial court's Order and Decree, Befwick was accorded due process plus. Yet Befwick persisted in its violations and failed to fulfill even the first condition of the trial court's Order and Decree. For the reasons set forth above, there was no need for an evidentiary hearing or for detailed appellate decision. Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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